UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
WOODHOLLOW LOFT, INC. ,	)	CASE NO. 07-20206
	)	Chapter 11
Debtor.	)	
**********		
SISTERS OF ST. FRANCIS HEALTH SERVICES, INC. d/b/a ST. MARGARET MERCY HEALTHCARE CENTERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY NO. 07-2123
	)	
WOODHOLLOW LOFT, INC. ,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

In this consolidated adversary proceeding/contested matter, the court is asked to determine which of two entities holds controlling interests in Indiana Alcoholic Beverage Permit RR45-16715: the Sisters of St. Francis Health Services, Inc. d/b/a St. Margaret Mercy Healthcare Centers ("SSFHS") or Woodhollow Loft, Inc. ("Woodhollow"), the debtor-in-possession in Chapter 11 case number 07-20206. The portion of this case which began as a contested matter relates to the extent to which Woodhollow owes a debt to SSFHS which constitutes an allowable claim in Woodhollow's Chapter 11 case.

The adversary proceeding was commenced by a complaint filed by SSFHS on December 4, 2007. The contested matter arises from an objection filed by Woodhollow to claim #5 of SSFHS on April 23, 2008. Pursuant to a motion filed by Woodhollow, the adversary proceeding and the contested matter were consolidated by the court's order entered on June 23, 2008.

The court has jurisdiction with respect to both the adversary proceeding and the

contested matter pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and (b), and N.D.Ind.L.R. 200.1(a). The adversary proceeding is a "core" proceeding under 28 U.S.C. § 157(b)(2)(A) and (O); the contested matter is a "core" proceeding under 28 U.S.C. § 157(b)(2)(B).

I. ISSUES PRESENTED

The issue presented by the adversary proceeding is the extent of the interests of Woodhollow and/or SSFHS in Indiana Alcoholic Beverage Permit RR45-16715.

The issue in the contested matter is primarily whether any claim of SSFHS was timely filed so as to be subject to consideration in the Chapter 11 case, and secondarily, if the claim was timely filed, the amount of the debt owed by Woodhollow to SSFHS subject to that claim.

II. THE RECORD BEFORE THE COURT

The manner of presentation of the factual/evidentiary record to the court was designated by the court's Order Concerning Determination of Case on a Stipulated Record entered on April 7, 2009. The pertinent provisions of that order state:

> IT IS ORDERED that the parties shall file a joint stipulation of fact by **May 4, 2009** which will constitute the sole and entire evidentiary record for the purposes of the Court's entry of final judgment in this case. The format of this submission will be as follows:
>
> 1. The entire record to be submitted to the court will not be placed on the docket. Rather, the parties will file a single document at the time of provision of the record to the court stating that the record has been submitted to the court, and including a designation of the general materials comprising the record as so submitted.
> 2. The original record will be delivered to the chambers of the court.
> 3. Only those portions of depositions which the parties submit into evidence as the designated record will be included in the record; each separate deposition shall be identified as a separate exhibit, and the pages and lines of each deposition shall be specifically designated.
> 4. It is not necessary for the parties to include in the designated record copies of any documents which appear on the public docket of either adversary proceeding number 07-2123 or case number 07-20206: the parties shall file a designation of each such document which is to be included in the designated record,

> identifying each such document by its title, date of filing, and docket record entry number.

On May 8, 2009, the parties filed their Notice of Filing of Materials in Support of Determination on Stipulated Record. As provided for by the April 7, 2009 order, the record was submitted the "old fashioned" way, in hard copy, due to limitations on the number of pages of material which may be submitted in a single discrete electronic submission. The court has possession of the original record.

As the third paragraph of the April 7, 2009 order stated, the "sole and entire evidentiary record" was to be provided by means of a joint stipulation of fact. The court utilizes this mechanism relatively frequently in order to provide the factual/evidentiary record for submission of a case to the court for determination; the court only utilizes this mechanism with consent of all parties. The intent of utilization of a stipulated record is to provide the court with all necessary factual materials without resorting to the expense and time expenditure of a trial in open court. Just as would be the case in a trial, when the evidence closes the evidence is closed, and the entire record for submission of the matter to the court is encompassed within the stipulated record. Unlike a summary judgment pursuant to Fed.R.Bankr.P. 7056/ Fed.R.Civ.P. 56, in which the court is limited with respect to its review of the evidence and its ability to draw inferences and factual conclusions from the evidence, when a case is submitted on a stipulated record the court is free to weigh all evidence, and determine inferences and factual conclusions, in the same manner as would adhere in an actual trial.

In Section III of its Defendant's Brief in Support of Determination of Matter on Stipulated Record, Woodhollow has asserted that in addition to the designated factual record, the court should consider other statements of SSFHS under the doctrines of "judicial admission" and "judicial estoppel". In providing for determination of this case on a stipulated record, the court intended that contentions of the nature of Woodhollow's would be subsumed within, and

resolved by, the parties' stipulated record, and the court could deny Woodhollow's "submission" of these additional statements on that basis. However, for the sake of completely resolving the record, the court will address this facet of Woodhollow's contentions.

Woodhollow essentially contends that the "judicial admissions" which it asserts have been made by SSFHS are not evidence, and thus are outside the scope of the April 7, 2009 order. Let's start first with Woodhollow's assertions concerning judicial admissions. All of the asserted admissions derive from a Motion for Relief from Stay and Abandonment of Real Property filed by SSFHS on March 21, 2007. This motion related solely to attempted termination of Woodhollow's occupancy of real property, and there is no mention in the motion of any matter relating to the alcoholic beverage permit.[1] The motion was premised upon the assertion that there was no enforceable written lease agreement between Woodhollow and SSFHS. Paragraph 35 of the motion asserted that, at most, Woodhollow was a tenant at sufferance with respect to the premises. Woodhollow filed its response to the motion on April 17, 2007, and on June 2, 2007, Woodhollow filed its Motion to Assume Lease or Executory Contract, which was premised upon the assertion that Woodhollow held a month-to-month tenancy with respect to SSFHS. A hearing was held on June 27, 2007 with respect to both of the foregoing motions, a hearing which resulted in an agreed order on July 17, 2007.[2]

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[1] This adversary proceeding, focused upon interests in the alcoholic beverage permit, was filed on December 7, 2007.

[2] While the court somewhat directed and brokered the provisions of the agreed order, the court made no formal determination of any issues relating to the motions, specifically stating on the record at the hearing that it was making no findings of fact or conclusions of law pursuant to Fed.R.Civ.P. 52 [Exhibit C, page 45-46]. The court also made it clear that its review of materials relevant to the two motions was very limited, essentially confined to an agreed order entered into between the parties in state court litigation. The parties acknowledged at the hearing that the debtor-in-possession did not execute the lease agreement between SSFHS and The Sunshine Boys as a party to that lease. It is thus totally erroneous for Woodhollow to state, as it does in lines 4-6 on page 4 of its initial memorandum, that the court determined anything at the June 23, 2007 hearing. No determination was made by findings of fact and conclusions of law under Fed.R.Bank.P. 7052/ Fed.R.Civ.P. 52(a)(1), either orally on the

The cases cited by Woodhollow on pages 8-9 of its initial memorandum relate principally to the doctrine of "judicial estoppel", which is a doctrine separate from that of the concept of a "judicial admission". The latter doctrine was described as follows in *Keller v. United States*, 58 F.3d 1194, 1199 [footnote 8] (7th Cir. 1995) as follows:

> FN8. Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal. Indeed, they are "not evidence at all but rather have the effect of withdrawing a fact from contention." Michael H. Graham, *Federal Practice and Procedure: Evidence* § 6726 (Interim Edition); *see also* John William Strong, *McCormick on Evidence* § 254, at 142 (1992). A judicial admission is conclusive, unless the court allows it to be withdrawn; ordinary evidentiary admissions, in contrast, may be controverted or explained by the party. *Id.* When a party testifying at trial or during a deposition admits a fact which is adverse to his claim or defense, it is generally preferable to treat that testimony as solely an evidentiary admission. Michael H. Graham, *Federal Practice and Procedure* § 6726, at 536-37.

As stated in the foregoing, to rise to the level of a "judicial admission", there must be a "formal concession" in a pleading, or a stipulation that is binding upon a party. The court does not view statements of argumentative assertions of fact or legal position made in a motion of the nature of that filed by SSFHS to constitute either a "formal concession" or a stipulation.[3] Thus, the statements which Woodhollow seeks to establish as judicial admissions do not constitute statements within that doctrine.

Given its argument, the more appropriate doctrine for Woodhollow to seek to invoke is that of "judicial estoppel". That doctrine has been well defined by the United States Supreme Court in *New Hampshire v. Maine*, 121 S.Ct. 1808, 1814-1815 (2001), as follows:

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hearing record or in a written order filed of record.

[3] In fact, Fed.R.Bankr.P. 9013 requires a motion to "state with particularity the grounds therefor". This statement of grounds is a mere assertion, and can rise to the level of a "concession" only if affirmatively "conceded" – not merely argumentatively or contrarily stated.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee,* 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich,* 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

. . .

Courts have observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," *Allen,* 667 F.2d, at 1166; accord, *Lowery v. Stovall,* 92 F.3d 219, 223 (C.A.4 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.,* 834 F.2d 208, 212 (C.A.1 1987). Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook,* 195 F.3d 299, 306 (C.A.7 1999); *In re Coastal Plains, Inc.,* 179 F.3d 197, 206 (C.A.5 1999); *Hossaini v. Western Mo. Medical Center,* 140 F.3d 1140, 1143 (C.A.8 1998); *Maharaj v. Bankamerica Corp.,* 128 F.3d 94, 98 (C.A.2 1997). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards,* 690 F.2d, at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C.I.T. Constr. Inc.,* 944 F.2d 253, 259 (C.A.5 1991), and thus poses little threat to judicial integrity. See *Hook,* 195 F.3d, at 306; *Maharaj,* 128 F.3d, at 98; *Konstantinidis,* 626 F.2d, at 939. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See *Davis,* 156 U.S., at 689, 15 S.Ct. 555; *Philadelphia, W., & B.R. Co. v. Howard,* 13 How. 307, 335-337, 14 L.Ed. 157 (1851); *Scarano,* 203 F.2d, at 513 (judicial estoppel forbids use of "intentional self-contradiction ... as a

> means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782.
>
> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

The foregoing decision of the United States Supreme Court has caused prior formulations of the doctrine of judicial estoppel to be somewhat questionable. Therefore, the formulations stated in *In re Cassidy*, 892 F.2d 637, 641-642 (7th Cir. 1990) and in *Sedwick v. West*, 92 F.Supp.2d 813, 819-820 (S.D.Ind. 2000) are perhaps illuminating, but are not in any manner controlling. The tests to be employed are those stated in *New Hampshire v. Maine*.

In applying these tests, it must first be noted that SSFHS succeeded in its position that the debtor-in-possession was not a formal party to any written lease by agreement, and not by determination by the court. The position asserted by SSFHS in regard to its motion for relief from the automatic stay and in response to the debtor's motion for assumption of an executory contract was focused solely upon interests in real property and rights to continued occupancy of real property. While it might appear as if these issues and the issue of interests in the alcoholic beverage permit in relation to the lease with The Sunshine Boys are interrelated, as will be seen the court does not view them to be so – particularly in light of the convoluted transactions among multiple parties which relate to interests in the alcoholic beverage permit, as contrasted to interests in the leased premises which housed the business in which that permit was utilized. Thus, in the general terms of the doctrine of "judicial estoppel" defined by the Supreme Court, the court does not view the position asserted by SSFHS with respect to the alcoholic beverage permit matters to be inconsistent with the position which it took with respect to interests in real property. In the language of the Supreme Court, positions taken by a party must be "clearly inconsistent", and the court determines that the positions taken by SSFHS in this case were not "clearly inconsistent".

The second prong of the test adopted by the Supreme Court is that the party "has succeeded in persuading a court to accept that party's earlier position". As stated previously, the court did not accept anyone's position with respect to the motion for stay relief and the motion to assume an executory contract: the court independently reviewed the submissions of the parties and arrived at its own conclusions. The result of those two motions was a consent order, and not a judicial determination. Thus, the second prong is not satisfied: the court was not mislead by SSFHS.

Finally, the third prong requires consideration of "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped". Throughout preliminary proceedings leading up to determination of the mechanism for submitting the adversary proceeding to the court, both parties advised the court that the transactions involved with respect to the alcoholic beverage permit were convoluted and almost unfathomable. They were correct. One only need read the four memoranda submitted to the court to appreciate that transactions involving the alcoholic beverage permit cannot be fit into any single concrete legal theory, and that determination of issues regarding the alcoholic beverage permit require review of a number of separate transactions and agreements among multiple parties. It is clear to the court from the parties' arguments that any position taken by SSFHS with respect to its motion for stay relief had no effect on the contentions of Woodhollow, and that no unfair advantage or unfair detriment to Woodhollow has been created by those assertions.

For the reasons advanced above, the court determines that Woodhollow's contentions as to the doctrines of judicial admission and judicial estoppel cannot be sustained. This case will be determine upon the stipulated record as provided by the parties and their respective arguments as advanced in their memoranda, without preclusion or modification under the foregoing theories.

III. DETERMINATION OF LEGAL ISSUES

A. Interests in Indiana Alcoholic Beverage Permit RR45-16715

The issue addressed by adversary proceeding number 07-2123, stated accurately, is the extent of interests of Woodhollow and/or SSFHS in an Indiana Retail Alcoholic Beverage Permit under which Woodhollow dispensed alcoholic beverages at its former business premises at Omni 41 in Schererville, Indiana. In its initial memorandum of law, Woodhollow has phrased the issue as a determination of "who has the right to possess" the permit. In its initial memorandum of law, SSFHS has phrased the issue in terms of a distinction between the holder of "legal title" to the permit and the party having "equitable" interests in the permit.

It is first necessary to delineate the nature of interests actually involved with respect to the alcoholic beverage permit, particularly in order to follow the convoluted path the permit has taken among various parties to arrive at its present resting place.

While it is clear, as both parties acknowledge, that a permit holder's interests in an Indiana alcoholic beverage permit constitute property of a bankruptcy estate under 11 U.S.C. § 541(a), the concept of "property of the estate" does not define interests of a permit holder in relation to the State of Indiana. An alcoholic beverage permit is essentially a license issued by the state which allows a permit holder to sell alcoholic beverages subject to the provisions of applicable state law; IC 7.1-3-1-1. In relation to the State of Indiana, "(a) permittee shall have no property right in a wholesaler's, retailer's, or dealer's permit of any type"; I.C. 7.1-3-1-2. Thus, the concept of ownership of an alcoholic beverage permit is misplaced: there is no legal title to an alcoholic beverage permit, and no equitable title in an alcoholic beverage permit. An application must "disclose the name of the applicant and the specific address where the alcoholic beverages are to be sold, and any assumed business name under which the business will be conducted"; IC 7.1-3-1-5. If the applicant is a corporation, club, association or organization, the application must also disclose "the names and addresses of the president and

secretary [of the entity] who will be responsible to the public for the sale of alcoholic beverage"; IC 7.1-3-1-5. When an alcoholic beverage permit has been issued, the person to whom it has been issued is required to "post and display, and keep posted and displayed, in the most conspicuous place in the person's licenced premises the person's permit to do business"; I.C. 7.1-3-1-20. As the foregoing clearly establish, the issuance of an alcoholic beverage permit is the grant of a license by the State of Indiana to the entity to whom the permit has been issued, to sell/dispense alcoholic beverages only on the premises with respect to which the applicant operates a business involving that sale/dispensing. One "holds" a permit for permitted uses; one does not "own" a permit as one would own a collection of vintage beer bottles.

With respect to a retailer's permit, the "commission may issue a liquor retailer's permit to a person who desires to sell liquor to customers for consumption on the licensed premises"; IC 7.1-3-9-1, thus emphasizing again that one of the principal incidents of holding a retailer's permit is the privilege of selling alcoholic beverages on the premises upon which the permittee conducts its business. The other principal incident of holding an alcoholic beverage permit is the ability to transfer the permit to another owner, or to another location apart from the original permit premises. However, as provided by IC 7.1-3-24-1, any sale, assignment or transfer of a permit may only be accomplished pursuant to provisions of applicable law, and the same is true for transfer of the location of a permit from its original designated permit premises.

The two primary qualities which give rise to value to a retailer's alcoholic beverage permit, and which cause interests in a permit to constitute property of a bankruptcy estate under 11 U.S.C §541, are: (1) the license from the State of Indiana to sell alcoholic beverages at the permit premises, and to thus generate income from the sale of those beverages; and (2) the potential ability to transfer the permit to another owner, and thus derive income or something of value in exchange for the agreement by the permit holder to transfer the permit to another entity, as ultimately approved by the commission. There is nothing in Indiana alcoholic

beverage law which prohibits an agreement affecting the ability of a permit holder to transfer a permit to another entity or to change the location of a permit, while at the same time allowing the permit holder itself to use the permit at a particular location. As a result, it is entirely possible and legal for a circumstance to exist in which a retail alcoholic beverage permit holder's ability to utilize an alcoholic beverage permit on particular premises is subject to an agreement with another entity which establishes that entity's right to control use of that permit at a premises other than that for which the permit was licensed, and/or to control transfer of the permit.

Properly understood, the issue in the adversary proceeding is the extent to which Woodhollow's right to use the alcoholic beverage permit was subject to an agreement which precludes the use of that permit at a premises other than that to which the permit was originally licensed, and/or allows an entity other than Woodhollow to exercise control over any possible transfer of that permit.

As noted above, the parties advised the court in preliminary proceedings that the arrangements regarding the permit were subject to convoluted separate transactions, involving multiple parties. Understandably, each party has attempted to fit its contentions into traditional legal theories. Certain of these legal theories focus on a discrete transaction or a discrete document. Certain other theories, primarily those of SSFHS, attempt to generally establish interests in the permit based upon asserted "equitable" grounds. While at times admirable in their ingenuity and creativity, the court views the parties' attempts to in the main miss the mark. Arrangements with respect to the alcoholic beverage permit, and rights to use it and to transfer it in relation to the two parties, must take into account the entire transactional history involving the permit from the date that it was originally used in the operation of a small sports bar at Omni 41 in Schererville. As the following discussion will address, each of the parties' separate theories fails to take into account the transactional history of the permit from that time, to its

being held by Woodhollow, and now to its being held "in escrow" by the State of Indiana.

One final note, and it cannot be overstated. The issue to be determined in this case has been made extraordinarily convoluted and difficult by a poor job of commercial document drafting and/or a failure to document certain stages of transactions at all. However it happened, there are obvious gaps in documenting transactions that were obviously known by the parties to be occurring. It is the filling in of these gaps that causes this case to be so difficult. Unfortunately, the person most likely to be able to fill in the gaps – Joseph J. Pellar – is deceased.

Let's first examine the contentions of the plaintiff SSFHS. The first theory is that stated on pages 2-4 of SSFHS' initial memorandum, which appears to be based upon a premise that the plaintiff somehow "acquired equitable title to the Permit" (page 4). The principal problem with this theory is that there is no document which expressly establishes any direct interest in the permit in SSFHS. On or about January 2, 1998, SMMHC (St. Margaret Mercy Healthcare Centers, Inc., which was then a wholly owned subsidiary of SSFHS) entered into an Asset Purchase Agreement with entities designated in paragraph 2 of the parties' Statement of Undisputed Material Facts. At the time that the agreement was entered into, Et Al, Inc. operated the "Time-Out" sports bar at Omni 41 and held Indiana Type 210-1 Retailer Alcoholic Beverage Permit #RR45-16715 in connection with its operation of that business (¶3 and ¶4 of the Statement). The alcoholic beverage permit and Et Al's liquor inventory were specifically excluded from the Asset Purchase Agreement (Statement, ¶6) because SMMHC and SSFHS "made a policy decision that direct ownership or possession of the permit was contrary to their mission as healthcare providers affiliated with the Roman Catholic Church" (Statement, ¶7). In this transaction, SMMHC never intended to own or possess the permit directly (Statement, ¶8). In conjunction with the Asset Purchase Agreement, Joseph Pellar and Et Al entered into a consulting and non-competition agreement with SMMHC (Statement, ¶9). This agreement had

a three-year term which began on January 2, 1998 (Statement, ¶10). Included in this agreement was the following provision:

> Consultant [Joseph Pellar] shall maintain or cause Et Al to maintain the liquor permit/license [RR45-16715] for the "Time-Out Sports Bar" so that the Time-Out Sports Bar may be operated at Fitness Center [Omni 41] in the same or similar manner as it was prior to Company [SMMHC] buying Fitness Center. (Exhibit 2, pgs. 1-2, ¶2d.)
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> Term and Termination: This Agreement shall begin on January 1, 1998, and, except as provided below, shall continue for three (3) years . . . (Exhibit 2, pg. 3, ¶5.)
>
> Et Al Liquor Permit/License: For three (3) years from January 1, 1998, Et Al shall maintain the liquor permit/license for the Time-Out Sports Bar so that the Time-Out Sports Bar may be operated at Fitness Center in the same or similar manner as it was prior to Company buying Fitness Center. In consideration for maintaining the liquor permit/license for the Time-Out Sports Bar, Company shall pay Et Al Ten Thousand Dollars and no/100 ($10,000.00). (Exhibit 2, pg. 7, ¶16.)

In exchange for this promise, the consulting agreement provided for a payment of $10,000.00 from SMMHC to the parties bound by the agreement. (Statement, ¶11).

The foregoing is the end of the trail with respect to direct evidence concerning the arrangement between Et Al., Inc. and SMMHC as to the permit. There is nothing in the evidence which establishes in any manner that SMMHC had any interest in the permit, either in its use or in the permittee's ability to transfer it. The documentation establishes that there was an agreement that the permit would remain in place at Omni 41 in conjunction with the operation of the Time-Out Sports Bar for a period of three years, but no provision was made for SMMHC to control any transfer of that permit which Et Al, Inc. may have desired to make. Thus, at the inception of the transactional trail, SMMHC (SSFHS) had no direct interest in the permit's use, and it had no ability to control its transfer, save to potentially sue Et Al., Inc. and Joseph Pellar for breach of the consulting agreement. Any contention that the plaintiff had some form of "equitable" interest in the permit at this stage of the transaction is without

evidentiary basis, even apart from the legal reality that the concept of an equitable interest in a permit is not a valid concept.

The next contention by SSFHS as to factual circumstances appears on pages 4-6 of its initial memorandum. This contention seeks to establish that the actual lessee of Woodhollow Loft – the more upscale restaurant which replaced Time-Out at Omni 41 – was intended all along to be Woodhollow, Inc. The problem with this contention is that the lease for the restaurant space was entered into with The Sunshine Boys, Inc. solely (Statement, ¶17). There is nothing in this lease which even indicates or implies, much less establishes, that Woodhollow would be bound by the terms of the lease in any way. To contend that the evidence establishes that at its initiation the lease was entered into with Woodhollow as a party is not supported by any evidence in this record.

The next section of conclusions of fact in the plaintiff's brief is on pages 6-7 of its initial memorandum. In that section, the plaintiff advances several theories as to why Woodhollow was more or less directly subject to the terms of the lease between The Sunshine Boys and SMMHC. In fact, paragraph 20 of the Statement states: "Woodhollow, Inc. is not and never has been a party to the Lease". The court takes this stipulation to mean that Woodhollow was never a direct party to the lease, which the evidence more than readily discloses. This portion of SSFHS' argument is not sustained by the record.

On page 7 of its initial memorandum, SSFHS begins its discussion of its substantive legal theories. The first of these theories is that Woodhollow ratified the lease by entering into an agreed order in state court proceedings. The concept for which SSFHS advocates – ratification – implies that all of the accouterments of a lease existed between SSFHS (or whoever) and Woodhollow, and that by the terms of the agreed order Woodhollow merely acknowledged what was already in place or had been performed. There is no evidence in the record that any arrangement had been effected between Woodhollow and SSFHS prior to the

agreed order, and any theory of ratification therefore fails.

The next theory advanced is on pages 9-10 of the initial memorandum. The argument here – similar in theory to, but much different in execution from one made by Woodhollow – is that the agreed order entered in state court constitutes a "stand alone" agreement, which totally defines the rights of the parties with respect to the permit. This contention won't fly because there is nothing in the agreed order itself, without reference to the lease between The Sunshine Boys and SMMHC, which provides for disposition of the permit in the event the premises are no longer occupied by The Sunshine Boys or by Woodhollow. The agreed order on its face merely provides for certain payments to be made, which the record conclusively establishes Woodhollow made. The agreed order, standing alone, establishes nothing with respect to any interests of SMMHC in the permit.

The next argument is on pages 9-10 of the initial memorandum, and it merely presents the bald assertion that there was an oral agreement between Woodhollow and SMMHC with respect to lease of the premises which by its terms controlled the permit as well. There is no evidence whatsoever of any oral agreement to that effect in this record, and that argument fails as well.

The next argument is on pages 10-12 of the initial memorandum. This argument seeks to establish that Woodhollow occupied the permit premises as a tenant at sufferance or a tenant at will with respect to SMMHC. This contention says nothing about disposition of the permit in the event that Woodhollow ceased to occupy the premises. The nature of the relationship between Woodhollow and SMMHC with respect to occupancy of the premises, standing alone, is largely irrelevant to the disposition of the alcoholic beverage permit, and this argument sheds no light on the latter issue.

The final argument of SSFHS is stated on pages 12-18 of its initial memorandum. The title of this argument is "Woodhollow, Inc. did not acquire all of the 'sticks in the bundle' with

respect to the permit".

The title of this section of the memorandum raises the specter of a cogent theory, but then it gets sidetracked to a sub-theory of "bailment". SSFHS contends that the actual arrangement between Woodhollow and it was that while Woodhollow may have held "legal title" to the permit, it was intended all along that SMMHC would hold the "equitable interest" in the permit. As the recitation above of the scheme of the Indiana alcoholic beverage laws establishes, there is no concept of the legal title/equitable interest with respect to an Indiana alcoholic beverage permit. A permit is a license granted by the State of Indiana to the holder of the permit that enables the holder of the permit to sell alcoholic beverages at a particular location; the permit holder is not the "owner" of the permit. There can be no "equitable interest" in a permit under Indiana law: the holder is the holder is the holder and is the sole focus of activities in relation to the permit. While it is possible by separate agreement to control transfer of a permit, as noted above, this form of control is not an "equitable interest" in a permit, but rather is a contractual arrangement between parties to seek to control the permit should the holder seek to utilize or transfer the permit in a manner inconsistent with the agreement with another party.

SSFHS expansively discusses the case of *In re The Ground Round, Inc.*, 482 F.3d 15 (1st Cir. 2007) in support of its theory. That case is not parallel to this one in any material way. In *The Ground Round*, the permit at issue was originally held by the lessor itself. It was transferred to the debtor/lessee pursuant to the provisions of a lease between the lessor and the debtor which provided for re-transfer by the debtor of the permit under certain circumstances. The Ground Round, the debtor in a bankruptcy case, essentially argued that the lessor had only a claim against it, and not a right to obtain re-transfer of the permit pursuant to the terms of the lease. The decision merely allows a remedy of essentially specific performance for return of the permit, a remedy which was imposed with respect to a specific

written agreement between the lessor and the debtor. There is no such specific direct agreement in this case.

SSFHS also cites the case of *Marion Trucking Co., Inc. v. Harwood Trucking, Inc.*, Ind. App. 116 N.E.2d 636 (1954) in support of its position. That case also is inapposite. A contract was entered into by which a business was to be purchased, including operating rights enabled by a permit granted by a regulatory authority to the buyer. The seller essentially reneged in transferring the operating rights evidenced by the permit. Because of the actions of the seller in seeking to defeat the transfer of the permit rights, the court held that the buyer was entitled to specific performance with respect to the seller's obligation to transfer those rights, or seek to transfer those rights, in good faith. Again, this case evidences no direct agreement between Woodhollow and SSFHS, and there is no evidence that there was ever any direct transaction between SSFHS and Woodhollow regarding the permit.

In conclusion, each of the separate theories advanced by SSFHS will not sustain its contention that the court should determine that any interest in the permit should be held by SSFHS.

As foreshadowed above, the contentions of Woodhollow fare no better.

The principal contentions of Woodhollow in this context are stated on pages 9-14 of its initial memorandum.

The first of these contentions is that Woodhollow holds the permit as a result of an unconditional transfer executed by Joseph Pellar, on behalf of Et. Al., and the consent of the Indiana Alcoholic Beverage Commission. As stated previously, this argument is in part based upon an erroneous premise that "ownership" of a permit is a viable concept under Indiana law, which it is not. The theory then proceeds in reliance upon the Consent to Transfer executed by Et Al., Inc. on August 30, 1999, which states:

Whereas Woodhollow Loft Bar & Grill has made an application

> with the Indiana Alcoholic Beverage Commission requesting that a certain . . . permit . . . be transferred to said applicant, and, whereas the Indiana Alcoholic Beverage Commission is now considering the granting of said transfer of such permit as aforesaid, I hereby formally give my consent to this transfer subject to the approval of the Indiana Alcoholic Beverage Commission and to surrender my permit on completion of transfer.
>
> s/ Joseph J. Pellar

The argument then advances essentially with the contention that Et Al. completely divested itself of any interest in the permit, and that the interest was solely in Woodhollow. As will be seen, this argument ignores the transactional history of this permit in relation to the permit premises upon which it was used. Additionally, the language in the Consent to Transfer is entirely consistent with, and in fact mandated by, Indiana alcoholic beverage laws. For the purposes of the license granted by the State of Indiana to an entity to purvey alcoholic beverages, the permitee/transferee must be qualified to hold the permit as if an initial permitee, and thus some form of shared use interest in the permit is not "permitted". This document does nothing more than transfer the permit to Woodhollow, in the language required by the Commission to transfer a permit.

In its reply brief, Woodhollow argues that there is nothing in the Agreed Order entered in state court which in any manner relates to any prior document or agreement. This contention is in part apparently based upon Woodhollow's assertions as to "judicial admission" or "judicial estoppel", which have been addressed above, and to the extent the argument relies on those contentions, it has been addressed.

There is nothing in Woodhollow's contentions which convinces the court that any of its several arguments are sufficient to resolve the dispute regarding the alcoholic beverage permit.

We now turn to the court's determination, which – unlike either of the parties' – melds multiple transactions among/between multiple parties into a cohesive and understandable

whole.[4]

On January 2, 1998, an asset purchase agreement was entered into by which SMMHC acquired the Omni 41 facility. Included in the acquisition were all of the furniture, fixtures and equipment owned by Time-Out, which in essence was the entity known as Et Al., Inc. Excluded from the transaction, by a specific provision, were the alcoholic beverage permit held by Time-Out for the operation of the bar/restaurant at Omni 41, and the inventory of alcoholic beverages held by Et Al., Inc. Regardless of the motive for excluding the alcoholic beverage permit from the transaction, it is absolutely clear that SMMHC acquired no interest whatsoever in the alcoholic beverage permit as a result of its purchase of Omni 41.

Joseph Pellar and Et Al., Inc. entered into a Consulting and Non-Competition Agreement with SMMHC for a three year term beginning January 2, 1998. In exchange for a payment of $10,000.00 made by SMMHC, Pellar and Et Al., Inc. agreed that the liquor permit/ license for the "Time-Out Sports Bar" would be maintained so that the bar would be operated at Omni 41 in the same or similar manner as it was with respect to the Time-Out Sports Bar operated in that facility prior to its acquisition by SMMHC. By the terms of this agreement, SMMHC acquired no interests in use of the permit and no concrete ability to restrict transfer of the permit. The use of the permit at this point was governed solely by an agreement that it would remain in place for a period of three years. Et Al., Inc. operated the Time-Out Sports Bar, and held the permit for that operation, from 1997 through August 30, 1999. However, bigger things were in the works. The Sunshine Boys, Inc. was formed as an Indiana corporation on November 12, 1998. In 1999, the concept of an upscale restaurant at Omni 41 was discussed between representatives of SMMHC and representatives of The Sunshine Boys, Inc., the idea being that a more upscale restaurant would replace the sports bar operated by Et

[4] Because the facts have been stipulated, the court will not necessarily cite any particular provision of the record for any particular statement of fact.

Al., Inc. As part of these arrangements, SMMHC spent a significant sum of money to upgrade the restaurant space. In April of 1999, SMMHC entered into a lease with The Sunshine Boys, Inc. to operate the Woodhollow Loft Bar. The lease contained the following provision:

> As permitted by Law, Landlord shall transfer a liquor license to Tenant upon execution of this Lease Agreement. Upon expiration or termination of this Lease Agreement Tenant shall work with Landlord to transfer the liquor license back to Landlord.

At this point, all incidents of control over the alcoholic beverage permit were in Et Al., Inc. and Joseph Pellar. The missing piece at this point is the manner in which SMMHC would uphold its promise to transfer the liquor license to The Sunshine Boys, Inc., as the lessee under the lease. This transfer did not occur. However, Woodhollow Loft, Inc. was incorporated on May 18, 1999. The alcoholic beverage permit was transferred by Et Al., Inc. to Woodhollow Loft, Inc. on August 30, 1999, and Woodhollow opened the now significantly refurbished restaurant on September 20, 1999. Again, there is no document which establishes the arrangement for transfer of the permit to Woodhollow, in contrast to the lease's provision for transfer of the permit to The Sunshine Boys, Inc. It is the court's job to determine the missing link or links.

The court finds that SMMHC would not have promised to transfer the alcoholic beverage permit to The Sunshine Boys, Inc. had it not obtained the consent of Et Al., Inc. and Pellar to this transfer. As is common in the operation of restaurants, the lessee or owner of the premises very often is a separate entity from the entity which actually operates the restaurant. It is obvious to the court that Woodhollow Loft, Inc. was set up as the operating entity for the restaurant, with The Sunshine Boys, Inc. as the lessee. This arrangement was understood by, and agreed to by, SMMHC; Et Al., Inc. and Joseph Pellar; The Sunshine Boys, Inc.; and Woodhollow Loft, Inc. Because the actual operator of a restaurant serving alcoholic beverages must be the permit holder, it was necessary that the permit be transferred to Woodhollow Loft,

Inc. rather than to The Sunshine Boys, Inc. as the lessee under the lease. That is what happened. Because of its significant expenditure in improving the premises, SMMHC needed to control the location of the permit, and to keep the permit at Omni 41 in the event that the restaurant business failed, or the operators of the restaurant business decided to move the business to another location. Ergo, the lease provision as to transfer of the permit to SMMHC in the event the lease was terminated or expired. However, the lease was not assigned by The Sunshine Boys, Inc. to Woodhollow Loft, Inc., and there is no evidence of a formal sub-lease between those entities with respect to the premises. For whatever difference it makes, up to this point there was never any privity of estate or contract between SMMHC and Woodhollow Loft, Inc. But, it is obvious that an agreement existed regarding retention of the permit at the Omni 41 site: Woodhollow operated the premises subject to the foregoing provision regarding transfer of the permit to SMMHC upon termination or expiration of the lease. Having omitted control over transfer of the permit in its transactions with Et Al., Inc., SMMHC "wised up" and sought to control the location of the permit by means of its lease with The Sunshine Boys, Inc. Based upon the record before the court, the court determines that all of the parties to the transaction involving transfer of the permit from Et Al., Inc. to Woodhollow Loft, Inc. understood that the permit would remain at the Omni 41 premises upon termination or expiration of the lease, and that despite the lack of evidence of a written agreement to this effect, that was in fact the agreement among the parties.

The evidence fully supports this conclusion. The testimony of Tom Fife in his deposition (lines 8-19 on page 66) is that SMMHC arranged for transfer of Et Al., Inc.'s alcoholic beverage permit to Woodhollow as part of the lease transaction with The Sunshine Boys, Inc.; *see also*, paragraphs 22 and 23 of the Statement of Undisputed Material Facts. Thus, it is clear that Woodhollow's acquisition of the permit was integrally related to the operation of a business by it at Omni 41, and that all parties involved – SMMHC; The Sunshine Boys, Inc.; Et Al., Inc.;

Joseph Pellar; and most importantly, Woodhollow Loft, Inc. – understood that Woodhollow's retention of interests in the permit was subject to its operation of a business at Omni 41. The court finds that there was an actual agreement among the parties to this effect, that is not documented in the record, but that is determined by inferences drawn from material evidence in the record.

We now come to the Agreed Order Regarding Prejudgment Possession entered on August 27, 2001 in case number 45D05-0108-CP-384 in the Lake Superior Court. In pertinent part, that agreement provides:

> This matter comes before the Court on the hearing on the Order to Show Cause and Pre-judgment Order of Possession, set for Friday, August 24, 2001 at 9:00 a.m. Present for the plaintiff, St. Margaret Mercy Healthcare Centers, Inc., were: its attorneys, Shawn D. Cox and Timothy P. Galvin, Jr.; Gene Diamond, President and Chief Executive Officer and Barbara Greene, Vice President of Business Development. Present for the defendant,, Woodhollow Loft, Inc., was its Vice President, Tom Fife, and one of its shareholders, Jack Weichman. Present for The Sunshine Boys, Inc. was its Vice President, Tom Fife.
>
> At the time set for hearing, the parties reached this Agreed Order Regarding Prejudgment Possession in open court. A transcript of the agreement made in open court is attached hereto as Exhibit "A". The defendants, The Sunshine Boys, Inc. and Woodhollow Loft, Inc. are to make the following payments:
>
> > Fifty Thousand ($50,000) Dollars by August 31, 2001 by 5 o'clock, p.m.;
> >
> > Fifty Thousand ($50,000) Dollars by September 30, 2001 by 5 o'clock, p.m.;
>
> As of September 1, 2001, defendants shall being paying current amounts due as fixed minimum rent under the Lease Agreement.
>
> Upon failure to pay the above referenced sums, the plaintiff shall have the right to pre-judgment possession of the property subject to the Lease (the restaurant site currently occupied by the Defendant(s) and located at 221 Rt. 41, Schererville, Indiana 46375), including the Leased Premises, and the Alcoholic Beverage Type-210 Restaurant (Liquor, Beer and Wine Retailer) Permit No. RR45-16715 which was transferred to the defendants

> pursuant to the Lease attached to plaintiff's complaint as Exhibit "A".

As evidenced by the terms of that document, the court finds that its terms were agreed to by representatives of Woodhollow Loft, Inc. and by The Sunshine Boys, Inc.

The agreement in the first part provides that certain payments will by made by The Sunshine Boys, Inc. and Woodhollow Loft, Inc. to cure a lease default. However, the most critical part of this agreed order is the first full paragraph on its second page. Interestingly, the critical provision of that paragraph is not the provision which provides that the plaintiff "shall have the right to pre-judgment possession of . . . the Alcoholic Beverage . . . Permit" if the required payments were not made. Rather, the critical portion of this document is the statement that the permit "was transferred to the defendants pursuant to the Lease attached to plaintiff's complaint as Exhibit 'A'" (emphasis supplied)[5]. This document evidences Woodhollow's acknowledgment that the alcoholic beverage permit is subject to the terms of the lease between SMMHC and The Sunshine Boys, including the provision that upon expiration or termination of the lease, the "Tenant shall work with Landlord to transfer the liquor license back to Landlord". Woodhollow did not assume the lease by this statement, but it did cause itself to acknowledge that the permit was subject to Section 8.1(S) of the lease.

In the court's view, the foregoing acknowledgment did nothing more than confirm the arrangement among the parties that the court has found existed regardless of that statement.

The lease agreement between The Sunshine Boys, Inc. and SSFHS/SMMHC was terminated by an agreed order between those parties approved by the court. That termination extinguished the right of Woodhollow to use the permit in the operation of its business. That

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[5] Interestingly, if the doctrine of judicial estoppel were to have any effect, the doctrine might be appropriately applied to Woodhollow with respect to this document. But SSFHS has not argued this point, and as stated above, the record before the court is unencumbered by this doctrine.

agreement also required Woodhollow to transfer the permit at the direction of SSFHS/SMMHC upon termination of the lease which allowed Woodhollow to operate a restaurant/bar with the alcoholic beverage permit at Omni 41. This makes perfect sense in light of the transactional history involving occupation of a restaurant/bar by an entity at Omni 41, and the use of an alcoholic beverage permit at that location to do so. It is apparent to the court – whether established directly by documents or by indirect evidence – that between SSFHS/SMMHC and Woodhollow, Woodhollow's interests in the permit were limited to Woodhollow's conducting a business at Omni 41. No party intended that the permit would be vested in Woodhollow in a manner which would allow it to unconditionally control transfer of the permit's location or transfer of the permit to another proposed permit holder.

If one were to attempt to fit the transactional history of the leased premises and the permit into a more formal legal theory, one could turn to concepts of privity of estate and privity of contract in the context of landlord/tenant relationships.

In the flow of the various arrangements which were made concerning use of space at Omni 41 for the conducting of a restaurant business selling alcoholic beverages, the most appropriate conceptual context arises in relation to real property concepts concerning landlords, tenants and sub-tenants. In terms of real property law, the interrelationships among these three classes of holders of interests in real property revolve around the concepts of privity of contract and privity of estate; *see, Fields v. Conforti*, Ind. App. 868 N.E.2d 507 (2007). In the circumstances of this case, thrown into the mix is the utilization of an alcoholic beverage permit necessary for the operation of the restaurant business by the entity occupying the real property. As noted previously, under Indiana property law an alcoholic beverage permit cannot be viewed as an interest in property, but for the purposes of conceptualization of the actual framework within which the parties constructed their transactions, it is helpful to view the transactions

regarding the alcoholic beverage permit as akin to a lease of that privilege.[6] Because the parties themselves conceptualized transactions regarding the leased space and the alcoholic beverage permit in the context of lease arrangements, this framework provides an appropriate mechanism for analysis of the issues before the court.

When SMMHC purchased Omni 41, the space occupied by the Time-Out sports bar was acquired by SMMHC as part of the transaction. Obviously, the alcoholic beverage permit was excluded from that transaction, and no interest was acquired in that permit by SMMHC at that time. However, the Consulting Agreement entered into between SMMHC, and Et Al., Inc. and Joseph Pellar, is one which provided the latter two parties with some form of interest in the real property acquired by SMMHC. Whether one views that interest to be that of a tenant or that of a licensee, the fee simple interest of SMMHC was diminished by the interests of those two entities in the real property. Under this arrangement, there was still no transfer of any interest

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[6] Paragraph 23 of the Statement provides:

> Fife, Heuertz and Stiglich understood that the Leased Premises came with a liquor license. Tom Fife and Jeff Heuertz, shareholders in both the Sunshine Boys and Woodhollow, Inc. believed that SMM conveyed the liquor license to Woodhollow Inc. for the purposes of renting the Woodhollow space. (Exhibit J, Fife Dep. Pg. 66, In:8; Exhibit K, Heuertz Dep. Pg. 20, lines 8-21; Exhibit H, Verified Complaint ¶ 19)

On page 66 of the deposition of Tom Fife (part of the designated record), the following appears:

> Q When you guys took over the space from what used to be Time Out lounge or Time Out sports bar, the space came with a liquor license, right?
> A Yes.
> Q And the hospital conveyed that liquor license to Woodhollow for the purposes of renting the Woodhollow space?
> A Yes.
> Q Did Woodhollow purchase the license off of the hospital, or did it lease the license under the lease?
> A. Leased the license under the lease.

in the alcoholic beverage permit to SMMHC – either the right to use the permit to sell alcoholic beverages or formal control over transfer of the alcoholic beverage permit. However, this agreement did provide a contractual restriction on the use and transfer of the permit for a three year term, a restriction which may have been enforceable by specific performance had Et Al., Inc. and Joseph Pellar breached it; *see*, *Marion Trucking Co., Inc. v. Harwood Trucking, Inc.,* Ind. App., 116 N.E.2d 636 (1954).

The record amply supports the determination that Et Al., Inc. and Joseph Pellar, and SMMHC, mutually agreed to the concept advanced by The Sunshine Boys, Inc. for a more upscale and expanded restaurant at Omni 41. This arrangement was memorialized by the lease between SMMHC and The Sunshine Boys, an arrangement which provided for lease of real property to The Sunshine Boys and, in the words of Tom Fife, lease of the alcoholic beverage permit. This lease – so obviously consented to by Joseph Pellar and Et Al., Inc. – terminated the lease/license between SMMHC and Et Al., Inc. with respect to any interest in real property. More importantly, the lease provides in Section 8.1(S) the following:

> S. As permitted by Law, Landlord shall transfer a liquor license to tenant upon execution of this Lease Agreement. Upon expiration or termination of this Lease Agreement Tenant shall work with Landlord to transfer the liquor license back to Landlord.

It is obvious that this provision evidences a restructuring of arrangements regarding the alcoholic beverage permit, by which SMMHC was given control over transfer of the permit. This determination is specifically supported by Tom Fife's interpretation of the transaction, and by paragraphs 22 and 33 of the parties' Statement, which conclusively evidences that an arrangement had been arrived at concerning SMMHC's control over transfer of the permit. At this point, The Sunshine Boys, Inc. is the direct tenant of SMMHC with respect to the real property, and the conceptual "lessee" of the alcoholic beverage permit.

Woodhollow then enters the picture. The record establishes that Woodhollow became

the occupant of the real property subject to the lease between SMMHC and The Sunshine Boys. This arrangement occurred with the obvious consent of both SMMHC as the landlord and The Sunshine Boys as the tenant. However, there is no documentation which establishes the terms of a formal sub-lease between The Sunshine Boys and Woodhollow, nor any documentation which establishes an assignment of the lease by The Sunshine Boys to Woodhollow. It is absolutely clear that at this point there is no privity of contract and no privity of estate between SMMHC and Woodhollow with respect to matters relating to real property interests under the lease between The Sunshine Boys and SMMHC. However, it is also clear that Woodhollow was subject to the contractual agreement between SMMHC and TSB concerning disposition of the permit in the event the lease between SMMHC and TSB was terminated. Given the obvious control provided to SMMHC with respect to transfer of the permit, it is beyond question that the permit was not transferred to Woodhollow unconditionally: it was clearly transferred subject to the provisions of the lease between SMMHC and The Sunshine Boys regarding its use and restrictions regarding its transfer. The agreed order approved on August 27, 2001 in case number 45D05-0108-CP-384 provides direct evidence of Woodhollow's subjectivization to the contract between SMMHC and TSB regarding the use of the permit, and concrete acknowledgment by Woodhollow that its acquisition of rights to use the permit arose from the lease between SMMHC and The Sunshine Boys, as follows:

> Upon failure to pay the above referenced sums, the plaintiff shall have the right to pre-judgment possession of the property subject to the Lease (the restaurant site currently occupied by the Defendant(s) and located at 221 Rt. 41, Schererville, Indiana 46375), including the Leased Premises, and the Alcoholic Beverage Type-210 Restaurant (Liquor, Beer and Wine Retailer) Permit No. RR45-16715 which was transferred to the defendants pursuant to the Lease attached to plaintiff's complaint as Exhibit "A". (emphasis supplied)

The provision of the lease which provided for transfer of the permit is Section 8.1(S), and that transfer was made pursuant to that provision, including the provision that upon "expiration or

termination" of the lease, "Tenant shall work with Landlord to transfer the liquor license back to Landlord". The court does not view this provision of the agreed order to provide for assignment of the lease between The Sunshine Boys and SMMHC to Woodhollow, but it does absolutely and clearly evidence that Woodhollow was subject to the terms of the lease between The Sunshine Boys and SMMHC with respect to both its occupancy of the leased premises and its rights to the alcoholic beverage permit. It is thus accurate to state, as SMMHC has contended, that there was no written lease agreement between SMMHC and Woodhollow, a contention which does not preclude Woodhollow from otherwise being subject to the contractual privity arrangement between SMMHC as a landlord and The Sunshine Boys as a tenant. This acknowledgment by Woodhollow did nothing more than effect the result which would adhere under Indiana law with respect to a sub-tenant, having no privity of contract or privity of estate with a landlord, upon termination of a tenant's interest in property under an arrangement by which the tenant had both privity of contract and privity of estate with the landlord. When The Sunshine Boys' right to occupy the premises under the lease was terminated – as it has been by an order of this court – then Woodhollow's rights to use the alcoholic beverage permit were terminated as well. Thus, in a very real sense – although due to the fact that incidents of use/control over an alcoholic beverage permit do not constitute an interest in real estate – when the rights of the tenant (The Sunshine Boys) to occupancy of the premises and to use of the alcoholic beverage permit terminated, so did those of the sub-tenant Woodhollow. Upon this termination, SMMHC was entitled to invoke the provisions of Section 8.1(S) of its lease with The Sunshine Boys, a provision to which Woodhollow had acknowledged that it was bound.

As stated by the court previously, an Indiana alcoholic beverage permit has two principal incidents with respect to the permit holder: first, the privilege accorded by the state to utilize the permit in the operation of the business of the permit holder, and second, the privilege accorded by the state to transfer that permit to another location or to another holder. The court

determines that in relation to SSFHS/SMMHC, Woodhollow's right to hold the privilege accorded by the State of Indiana in the operation of its business terminated upon the termination of its rights to possession of the permit premises at Omni 41, and that Woodhollow's privilege accorded by the State of Indiana to transfer the permit terminated concurrently.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Woodhollow Loft, Inc. has no right or privilege to continued use of Indiana Type 210-1 Retailer Alcoholic Beverage Permit No. RR45-16715.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Woodhollow Loft, Inc. shall cooperate fully with the Sisters of St. Francis Health Services, Inc. in all respects concerning transfer of Indiana Type 210-1 Retailer Alcoholic Beverage Permit No. RR45-16715 to such transferee as Sisters of St. Francis Health Services, Inc. may designate.

B. The Claim of SSFHS

Claim #5-1 was filed on January 10, 2008 by Sisters of St. Francis Health Services, Inc. dba St. Margaret Mercy Healthcare Centers. On April 23, 2008, Woodhollow filed its objection to that claim. The objection states three grounds for asserted denial of the claim:

1. The claim was not timely filed;

2. The Debtor has no obligations under the lease (between SMMHC and The Sunshine Boys); and

3. IC 32-31-1-17 does not provide for the payment of attorney's fees, costs of collection and interest.

The court deems the first asserted ground for denial of the claim to be dispositive. The court will briefly address the second stated ground, and will not address the third.

On February 5, 2007, the court issued its Form B9F "Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines". Docket record entry #9 evidences that this document

was sent by first class mail to SSFHS/SMMHC, and there is no contention by the claimant that it did not receive the document in a timely fashion.

Pursuant to Fed.R.Bankr.P. 3003(c)(3), the foregoing notice to creditors stated the deadline for the filing of proofs of claim to be June 14, 2007. Claim #5-1 of SSFHS was filed on January 10, 2008. It is undeniable that the claim is therefore untimely under Fed.R.Bankr.P. 3003(c)(3).

The case of *In re Greenig*, 152 F.3d 631 (7th Cir. 1998) is controlling. Although decided under Fed.R.Bankr.P. 3002(c) in the context of a Chapter 12 case, the holding of that case is equally applicable to Fed.R.Bankr.P. 3003(c)(3) in its pronouncement of the absolute nature of claim filing deadlines, and the limited exceptions which may be taken advantage of with respect to those deadlines. Fed.R.Bankr.P. 3003(c)(3) provides:

> (c) Filing of proof of claim
>
> . . .
>
> (3) Time for filing
>
> The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).[7]

Fed.R.Bankr.P. 3003(c)(3) incorporates the provisions of Fed.R.Bankr.P. 3002(c)(2), (c)(3), and (c)(4) and (c)(6), which provide as follows:

> (c) Time for filing
>
> . . .
>
> (2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.
>
> (3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for

[7] The record establishes that SSFHS is within the provisions of Fed.R.Bankr.P. 3003(c)(2), and thus was required to file a proof of claim.

> the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.
>
> 4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.
>
> (6) If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

It is undisputed that claim #5-1 is untimely under the dictates of *In re Greenig, supra.*, absent some saving grace provided by statutory or case law exception.

In terms of a statutory exception, SSFHS seeks to invoke Fed.R.Bankr.P. 3002(c)(4) by asserting that its claim arises from rejection of an executory contract, and that the court has yet to set a deadline for the filing of such claims.

It is to first be noted that throughout these proceedings SSFHS has contended that there was no lease between it (SMMHC) and Woodhollow. In the prior section of this decision, the court has determined that there was in fact no executory lease or other contract between these entities. There was no privity of contract or estate between Woodhollow and SSFHS (SMMHC) with respect to occupancy of the premises upon which Woodhollow conducted its business. There never having been an executory contract or lease between SSFHS (SMMHC) and Woodhollow, the foregoing exception simply does not apply.

Moreover, 11 U.S.C. § 501(g)(1) provides for the allowance of claims arising from a rejection of an executory contract under either 11 U.S.C. § 365 or under the terms of a Chapter 11 plan. Apart from the fact that there was never an executory contract between SMMHC and Woodhollow which Woodhollow could reject, the debtor never sought rejection of any

agreement or arrangement between it and SSFHS. Rather, the debtor sought to assume an arrangement based upon an argument that a month-to-month tenancy had arisen between the parties. SSFHS opposed this assertion. The order entered by the court which resolved this contested matter did not constitute "rejection" of an executory contract or lease; rather, the court merely approved the parties' agreement as to the terms of cessation of occupancy by Woodhollow of space at Omni 41. There is therefore no room in this case for the operation of Fed.R.Bankr.P. 3002(c)(4). Even assuming, *in arguendo*, that Rule 3002(c)(4) was somehow applicable, the court endorses the following determination in *Lianas v. Creditors Committee, of Deja Vu, Inc.*, 780 F.2d 176, 179 (1st Cir. 1986):

> Even assuming, *arguendo,* that Rule 3002(c)(4) is applicable, the rule imposes no duty on the Bankruptcy Court to instruct a creditor to file a proof of claim arising from the rejection of an executory contract. That rule merely allows the court to fix an appropriate time for the filing of such claims. In addition, the court's failure in this case to instruct Liakas to file a proof of claim within 30 days after the June 10 hearing was of no consequence. The court set January 30, 1984, as the bar date by which proofs of claim had to be filed. Liakas does not dispute that he received notice of that date. Thus, Liakas had much more than 30 days after the June 10 hearing in which to file a proof of claim.[8]

SSFHS seeks to assert the timeliness of its claim by application of the "informal proof of claim" doctrine.

The doctrine of an "informal proof of claim" has been recognized by the United States Court of Appeals for the Seventh Circuit; *see, e.g., Wilkens v. Simon Brothers, Inc.*, 731 F.2d 462, 464-65 (7th Cir. 1984); *Matter of DeVries Grain & Fertilizer, Inc.*, 12 F.3d 101, 103 (7th Cir. 1993); and *In re Outboard Marine Corp.*, 386 F.3d 824, 828-29 (7th Cir. 2004). However, to the author's knowledge, no case of the United States Court of Appeals for the Seventh Circuit has

[8] To the extent that any claim of SSFHS may be sought to be asserted under 11 U.S.C. § 502(b)(6) there was no lease to terminate subsequent to the date of filing of the petition [thus rendering inapplicable § 502(b)(6)(A)] and paragraphs 44 and 45 of the parties' Statement precludes any claim for fixed rent from August 2001 forward.

addressed the potential conflict of the absolute rules stated in *In re Greenig, supra*, with the concept of "informal proof of claim", and there is thus some doubt as to the extent of the "informal proof of claim" doctrine in light of *In re Greenig*. Be that as it may, the court fully endorses the determination of the standards to be applied to an asserted "informal proof of claim" stated in *In re Fink*, 366 B.R. 870, 876-877 (N.D.Ind. Ft. Wayne Division, 2007). This court adopts the following standards from that decision:

> Reviewing the origin, the growth, the confusion and the litigation spawned by informal claims persuades the court that the concept "should be tethered rather closely to its roots." *In re Harris,* 341 B.R. 660, 664 (Bankr.N.D.Ind.2006). Doing so will ease the tension between the elasticity of informal claims and the more rigid claims structure set out in the Bankruptcy Code and rules of procedure. It will also reduce the uncertainty and the unpredictability as to what constitutes an informal proof of claim and the doctrine's tendency to increase rather than diminish litigation. Such an approach is consistent with the original purpose of the doctrine and the Seventh Circuit's concept of an informal proof of claim as an "incomplete proof of claim." *Matter of Stoecker,* 5 F.3d 1022, 1028 (7th Cir.1993). It is also consistent with the circuit's numerous cautionary remarks made in connection with discussing both late claims and amendments to claims. *Greenig* held that the court has no equitable authority to allow late claims, *Greenig,* 152 F.3d at 631, and even when the circuit has discussed the scope of permissible amendments to timely claims, it has warned that the expiration of the claims bar date is a significant event; that post-bar date efforts at amendment should be viewed with caution and rarely allowed. *Plunkett,* 82 F.3d at 741; *Holstein v. Brill,* 987 F.2d 1268, 1270-71 (7th Cir.1993). If the court is to be wary of post-bar date amendments to timely formal proofs of claim, it seems that it should be even more cautious with post-bar date attempts to amend something characterized as an informal claim. Finally, a narrower, more cautionary approach to the issue is also consistent with the Supreme Court's recent admonitions that exceptions to general principles should be construed narrowly and should not be allowed to expand beyond their original purpose. *See, Exxon Mobil Corp. v. Saudi Basic Industries Corp.,* 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005)(narrowing the growth of the *Rooker-Feldman* doctrine); *Marshall v. Marshall,* 547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006)(restricting the expansion of the probate exception to federal jurisdiction).
>
> Trimmed back to something more closely approximating the

doctrine's original shape, an informal proof of claim is a defective claim. In other words, it is an effort to assert a claim against the bankruptcy estate which, usually for technical reasons, fails to fulfill the required formalities. *American Classic Voyages,* 405 F.3d at 132; *Waterman & Assoc.,* 227 F.3d at 608-09; *Stoecker,* 5 F.3d at 1028. It should not be found in a masquerade in which some other type of relief is sought and then subsequently unmasked to reveal what is argued to have been a proof of claim all along. This is especially so when the filings have been made by sophisticated law firms and experienced bankruptcy practitioners. It is one thing to treat filings made by pro se creditors who may not understand the bankruptcy process with a degree of latitude-in precisely the same way that the pleadings filed by pro se litigants are broadly construed so as to preserve the controversy for a disposition on the merits. It is quite another thing, however, when those filings come from attorneys. *Outboard Marine,* 386 F.3d at 828. They are held to a higher standard. *See, Matter of Maurice,* 69 F.3d 830, 834-35 (7th Cir.1995). Attorneys, particularly experienced bankruptcy practitioners, are expected to know the difference between motions and objections and adversary proceedings and claims, and they are expected to file the appropriate thing at the appropriate time.

This approach is entirely consistent with the purpose behind amendments, one of which "is to cure a defect in the claim as originally filed...." [FN2] *In re International Horizons, Inc.,* 751 F.2d 1213, 1216 (11th Cir.1985). Before one can conclude that a particular thing suffers from a defect that can be corrected, one must first know what that thing is striving to be. Something designed to be an automobile should not be characterized as a defective airplane, even though both may have wheels, an engine and some type of passenger compartment. The same should be true for claims. A permissible amendment must begin with the proposition that the avowed purpose of the original submission was an attempt to file a proof of claim; if so, then deficiencies or shortcomings in the original filing may be corrected. The court should not begin with a filing that was consciously designed to serve one purpose and then find within that document a different purpose altogether, thereby legitimizing an otherwise untimely claim.

> FN2. The other purposes of an amendment-to describe the claim with greater particularity or plead a new theory of recovery based on the original facts-are not implicated by informal claims.

Properly confined, the informal claim doctrine can be applied liberally in order to honor the substance of the creditor's actions-the genuine attempt at filing a proof of claim-rather than allowing

> technical details of form to thwart the effort. Nonetheless, as one moves beyond this area of primary focus the court should be more critical and circumspect. In doing so, it is entirely possible to honor substance over form and yet still recognize that the substance of a particular thing may be exactly what it purports to be and nothing more. *In re Hotel St. James Co.,* 65 F.2d 82, 83 (9th Cir.1933). Then, any similarity between that submission and a proof of claim is nothing but a happy coincidence, which, quite conveniently, allows the creditor to argue that a filing made for one purpose is really something entirely different.

SSFHS relies on its March 21, 2007 "Verified Motion of St. Margaret Mercy Healthcare Centers for Relief from Stay and Abandonment of Real Property" as the assertion of an informal proof of claim. That document fails to satisfy the foregoing standard. In paragraphs 16-21, SMMHC set out monetary amounts which it asserted were owed it under its lease with The Sunshine Boys. However, in paragraph 22, SMMHC stated that it had "never entered into any written agreement to allow Woodhollow to assume the rights of TSB under the Lease", an assertion that undercuts any assertion of a debt on the part of Woodhollow to SMMHC under the terms of the lease. Paragraph 28 of the motion asserts that "TSB was in default for failing to pay the Percentage Rent", and again asserts that Woodhollow was not a party to the lease and had no interest in the lease. Paragraphs 30-32 of the motion assert a default by TSB, and do not in any manner assert an obligation by Woodhollow to pay SMMHC. The foregoing assertions are echoed in paragraph 39 of the motion. Apart from the generic prayer for relief in nearly every motion or complaint "that all other relief just and proper" should be granted to the movant/plaintiff, the prayer for relief in the motion is solely for relief from the automatic stay and abandonment of property from the estate.

Even extraordinarily liberally construed, the motion for relief from stay/abandonment asserts no claim of indebtedness against Woodhollow; rather, the motion asserts indebtedness alleged to be owed by TSB to be a basis for termination of whatever interests in the real property Woodhollow might hold. In further formulation of its approach to the informal proof of

claim doctrine, the court stated in *In re Fink, supra*, 366 B.R. 878, the following:

> If we are going to talk about claims, and whether a claim is being asserted against anyone, we should be careful to recognize the distinction between the debtor and the bankruptcy estate. The debtor is the entity that is the subject of the bankruptcy proceeding, 11 U.S.C. § 101(13), while the estate consists of the property from which a distribution to creditors will ultimately be made. 11 U.S.C. § § 541, 726. Consequently, a more appropriate formulation, and one which is used by many courts, is to ask whether the document which is urged to be an informal proof of claim makes a demand upon the *estate* and expresses an intent to hold the *estate* liable. *See e.g., In re Unioil, Inc.,* 962 F.2d 988, 992 (10th Cir.1992); *In re Franciscan Vineyards, Inc.,* 597 F.2d 181, 183 (9th Cir.1979); *In re Mitchell,* 82 B.R. 583, 586 (Bankr.W.D.Okla.1988). *See also, International Horizons,* 751 F.2d at 1217. Indeed, that is precisely the formulation used by some of the earliest decisions discussing the issue. *In re Thompson,* 227 F. 981, 983 (3rd Cir.1915); *In re Ragan,* 2 F.2d 785, 786 (1st Cir.1924); *Hotel St. James,* 65 F.2d at 83; *In re High Point Seating Co.* 181 F.2d 747, 750 (2d Cir.1950) (citing 3 Collier on Bankruptcy, p. 171 (1941 ed.)). Stated another way, one could ask whether the supposedly informal proof of claim asserts a claim against the estate and an intent to share in a distribution of its assets. *Donovan Wire & Iron,* 822 F.2d at 39 (citing *Tarbell v. Crex Carpet Co.,* 90 F.2d 683, 685-86 (8th Cir.1937)). *See also, International Horizons,* 751 F.2d at 1217 ("seek recovery from the estate.").

There is clearly no intent whatsoever in SMMHC's motion for relief from stay/abandonment to hold the bankruptcy estate of Woodhollow liable for anything. The entire thrust of the motion is that any interest that Woodhollow may have had in the subject real estate was terminated because TSB did not pay an obligation asserted to be owed by it to SMMHC.

The court determines that the foregoing motion for stay relief/abandonment does not constitute an "informal proof of claim".

Finally, even were the court to deem SSFHS to have filed an allowable claim, as determined in the preceding section of this memorandum of decision, SMMHC/SSFHS had no right to proceed against Woodhollow with respect to rent for the demised premises under the lease with The Sunshine Boys, Inc. The agreed order entered in state court provides an

arrangement between SMMHC and Woodhollow for payment by Woodhollow of base rent owed by TSB to SMMHC, and it is undisputed that all of the base rent required to be paid by Woodhollow pursuant to that arrangement has been paid. There is nothing in that document which provides for Woodhollow's assumption of an obligation to pay percentage rent under the terms of the lease entered into between SMMHC and TSB.

Because of the court's foregoing determinations, it is unnecessary to discuss the parties' contentions as to "add ons" under the terms of the lease, such as interest, attorney's fees, and expenses incurred by SMMHC.

Based upon the foregoing, the court determines that the objection of Woodhollow to the claim of SSFHS/SMMHC should be sustained.

IT IS ORDERED, ADJUDGED AND DECREED that SSFHS/SMMHC has no allowable claim in case number 07-20206 with respect to the debtor Woodhollow Loft, Inc.

Dated at Hammond, Indiana on November 16, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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